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Supreme Court, U.S.
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No. [redacted]

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK HARDAWAY,

Petitioner.

VS.

DONALD S. YOUNG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") require that the Seventh Circuit deny a petition for writ of habeas corpus, even though a unanimous panel found that the Illinois courts violated the 14 year-old petitioner's Fifth Amendment rights by admitting an involuntary confession against him, when no "special care" was taken to ensure that the 14 year-old understood his rights, he had no parent or adult to protect him, he was interrogated for over 14 hours by numerous detectives, and he made allegations that he had been abused throughout his interrogation?

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The opinion of the court of appeals is reported at *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002). The district court opinion is reported at *Hardaway ex rel Young*, 162 F. Supp.2d 1005 (N.D. Ill. 2001). The opinion of the Appellate Court of Illinois, First District is reported at 307 Ill. App.3d 592 (1st Dist. 1999).

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2002. On December 4, 2002, Justice Stevens extended the time for filing a petition for a writ of certiorari to February 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

The Seventh Circuit reversed the district court's granting of Derrick Hardaway's ("Hardaway's") petition for writ of habeas corpus, despite indicating that it was doing so:

> with the gravest misgivings and only in light of the stringent standard of review that applies under applicable law, because [the Seventh Circuit panel was] convinced that the many other indicia under Illinois law of the special care that must be exercised with children as young as 14 strongly suggests that an injustice was committed.

Hardaway, 302 F.3d at 759-60. Acknowledging that the district court "had good reason for" granting Hardaway's petition, the Seventh Circuit found that:

> [t]here is no doubt that Hardaway's youth, the lack of a friendly adult, and the duration of his interrogation are strong factors militating against the voluntariness of his confession; indeed, it seem[ed] to [the panel] that on balance the confession of a 14-year-old obtained in those circumstances may be inherently involuntary.

Hardaway, 302 F.3d at 767-68. Despite these findings indicating a violation of Hardaway's constitutional rights by the Illinois courts, the Seventh Circuit reversed the district court's decision to grant Hardaway's petition for writ of habeas corpus, effectively denying Hardaway any meaningful federal court review of his conviction and sentence of 45 years in prison. *Id.*

Circumstances of Hardaway's Interrogation

After his transfer from juvenile to adult criminal court at age 14, Hardaway filed a motion to suppress statements taken from him on September 4, 1994. *Hardaway ex rel Young*, 162 F. Supp.2d 1005, 1009 (N.D. Ill. 2001).[1] The court-reported statement Hardaway sought to suppress was taken when he: (1) was only 14 years old; (2) had been at the police station for over 14 hours by himself; (3) had been interrogated by at least five Chicago Police Department detectives; (4) was kept in the same interrogation room almost all day and night; (5) was not allowed to see or even speak with his parents; and (6) had made allegations that one detective physically abused him during his interrogation. *Hardaway*,. 162 F. Supp.2d at 1008.

At approximately 8:00 a.m. on September 4, 1994, two veteran Chicago police detectives woke 14 year-old Hardaway at his home and took him to the police station for questioning regarding the shooting of Robert Sandifer. *Hardaway*, 302 F.3d at 760. Upon arrival at Area 2, Detectives Arbataitis and Lane interrogated Hardaway for the first time at about 8:30 a.m. *Id.* Detectives Lane and Arbataitis again interrogated Hardaway at about 10:30 a.m. *Id.* At about 4:30 p.m., Detective McCann and Gang Crimes Specialist Oliver relieved Detectives Lane and Arbataitis and began another interrogation of Hardaway. *Id.* At approximately 7:00 p.m. Assistant State's Attorney ("ASA") Harney, Youth Officer ("Y.O.") Geraci, and Detective McCann interrogated Hardaway yet again. *Hardaway*, 302 F.3d at 761. At 10:45 p.m., Hardaway was again interrogated, this time by ASA Harney, Detective McCann,

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[1] Petitioner cites to the opinions of both the district court and the Seventh Circuit in the Summary of the Case.

and Y.O. Geraci, and gave the court reported statement that ultimately led to his conviction. *Id.*

As the Seventh Circuit concluded, the youth officer – who was only present during the 7:00 p.m. and 10:45 p.m. interrogations of Hardaway – was essentially "a potted plant," who did nothing to protect Hardaway's rights. *Hardaway*, 302 F.3d at 765. Detectives failed to call a youth officer when Hardaway was brought to the police station at 8:30 a.m., and when he was officially placed under arrest at 10:30 a.m. *Id* at 761.[2] In fact, detectives did not call a youth officer until 4:30 p.m., nine hours after 14 year-old Hardaway was brought to the police station for questioning. *Id.* Despite being called at 4:30 p.m., the youth officer did not come to speak to Hardaway until the 7:00 p.m. interrogation began, during which the youth officer essentially did nothing and remained "mute" throughout. *Hardaway*, 302 F.3d at 765. As the Seventh Circuit concluded, a youth officer who does nothing – like Y.O. Geraci – "will not be a considered a friendly adult for purposes of the totality of the circumstances test." *Id.* at 765. Thus, no friendly adult was present to assist Hardaway during his interrogation.

Despite attempts by his mother and father to see and talk to him, Hardaway was not allowed contact with *any* family or friends throughout the 14 hours he was at the station, even after he informed an assistant state's attorney that he had been beaten by detectives. *Id.* Thus, Hardaway was without family or friend throughout the entire 14 hours he was at the police station on September 4, 1994, during which he was either being interrogated by police, or waiting

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[2] At the time of Hardaway's arrest and interrogation, the Illinois Juvenile Court Act required law enforcement officers to "without unnecessary delay take the minor [who had been taken into custody] to the nearest juvenile police officer designated for such purposes." 705 ILCS 405/5-6(1).

in the interrogation room *alone* between bouts of interrogation. *Hardaway*, 162 F. Supp.2d at 1009.

No evidence was presented that Hardaway had ever been read his *Miranda* rights prior to his September 4, 1994 arrest. *Hardaway*, 302 F.3d at 767. *No* evidence was presented that Hardaway understood his *Miranda* rights, or the consequences of waiving those rights. Moreover, *no* evidence was presented that the officers treated Hardaway any differently than the average adult murder suspect when reading him his *Miranda* rights. Simply put, there was absolutely *no* evidence indicating that Hardaway made a knowing, intelligent, and voluntary waiver of his *Miranda* rights on September 4, 1994. Nonetheless, the Seventh Circuit concluded that AEPPA precluded it from granting Hardaway's writ.

Procedural History of the Case

After the trial court denied Hardaway's motion to suppress, a jury trial was conducted. *Hardaway*, 162 F. Supp.2d at 1010. Even the most cursory glance at the facts of this case reveals that Hardaway's *involuntary* statement was the predominant piece of evidence that led to his conviction.[3] Hardaway was convicted by the jury of first degree murder, under an accountability theory, on November 1, 1996. At age 16, Hardaway was sentenced to 45 years in prison on February 25, 1997 for his accountability conviction. *Id.* The First District of the Illinois Appellate Court affirmed Hardaway's conviction on September 10, 1999. *Hardaway*, 162 F. Supp.2d at 1010. Hardaway filed a petition for writ of habeas corpus with the district court after the Supreme Court of Illinois denied his

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[3] In fact, there were *no* eyewitnesses to the shooting of Robert Sandifer and *no* physical evidence connecting Hardaway to the shooting.

Petition for Leave to Appeal to the Supreme Court on May 31, 2000. *Id.* The district court granted Hardaway's petition for writ of habeas corpus and ordered his confession suppressed, finding that it had been involuntarily obtained in violation of the Fifth Amendment. *Id.* at 1017.

The Seventh Circuit reversed the district court decision, finding that even though it would have found Hardaway's confession involuntary, the Illinois courts' decisions finding Hardaway's confessions voluntary did not involve "unreasonable application[s] of clearly established Federal law," and therefore, AEDPA did not *allow* the federal courts to grant his writ. *Hardaway*, 302 F.3d at 768.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit misapplied the standards set forth in AEDPA for granting writs and effectively found that AEDPA does not *allow* federal courts to grant a writ even when it finds a clear violation of a petitioner's constitutional rights. Thus, the Seventh Circuit's decision is inconsistent with a proper interpretation of this Court's decision in *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) interpreting the requirements of AEDPA. In fact, the Seventh Circuit's interpretation of AEDPA conflicts directly with the interpretations of the Fifth, Third, Ninth, and Second Circuits. Further, the Seventh Circuit's decision is contrary to the only precedent from this Court regarding juvenile confessions – namely, this Court's decisions in *Haley v. Ohio*, 332 U.S. 596 (1948), *Gallegos v. Colorado*, 370 U.S. 49 (1962), and *In re Gault*, 387 U.S. 1 (1967). This Court should grant certiorari to address the Seventh Circuit's misapplication of AEDPA's requirements to the facts of this case in light of the relevant precedent of this Court.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT ERRED IN FINDING THAT AEDPA PRECLUDED ISSUANCE OF HARDAWAY'S WRIT WHEN THERE WAS A CLEAR VIOLATION OF HIS FIFTH AMENDMENT RIGHTS WHEN HIS INVOLUNTARY CONFESSION WAS ADMITTED AGAINST HIM AT TRIAL.

The Seventh Circuit refused to grant Hardaway's writ by hiding behind the cloak of AEDPA'S requirement that a state court decision must involve an "unreasonable application of clearly established Federal law" before a writ may issue. The Seventh Circuit's conclusion that AEDPA's requirements precluded it from affirming the district court's decision is erroneous. Such an interpretation of AEDPA would require federal courts to effectively rubber stamp state court decisions, affording petitioners such as Hardaway absolutely *no* meaningful federal court review. In

fact, the Seventh Circuit's decision leads to the inevitable conclusion that AEDPA divests federal courts of the power to reverse state court decisions that are contrary to the United States Constitution, and the binding precedent as set forth in the decisions of this Court. This interpretation of AEDPA is contrary to the spirit of the Act and this Court's decisions interpreting the Act and thus, must be rejected.

A. The Seventh Circuit's Interpretation of AEDPA Would Preclude Federal Courts From Granting Writs of Habeas Corpus in Cases Where State Courts Undeniably Violated a Petitioner's Constitutional Rights and Misapplied This Court's Cases.

The precedent of this Court firmly establishes that AEDPA's requirements do not divest federal habeas courts of the power to grant writs of habeas corpus in cases where a state court decision is contrary to the United States Constitution and the precedent of this Court.[4] In *Williams*,

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[4] Moreover, one look at the legislative history of 28 U.S.C. § 2254(d) (AEDPA) supports this Court's interpretation of section 2254(d) in the *Williams* decision. The Congressional Record makes clear that the legislature's intent in enacting AEDPA was to prevent relitigation of state court criminal trials in federal court, not prevent federal courts from reversing unconstitutional state court decisions. 142 Cong. Rec. S3446-47 (April 17, 1996) (statements of Orrin Hatch who drafted § 2254d); 142 Cong. Rec. H3602 (April 18, 1996)(statements of Hyde). The legislative intent in enacting section 2254(d) was to ensure that federal courts deferred to state court decisions only when the state court has "properly applied federal law." 142 Cong. Rec. S3446-47 (April 17, 1996). Orrin Hatch, drafter of section 2254(d) , explained that the section allows "[f]ederal court[s] to overturn State court decisions that *clearly contravene Federal law.*" 142 Cong. Rec. S3446-47 (April 17, 1996) (emphasis added). The notes further clarify that section 2254(d) allows a federal court to grant a writ of habeas corpus when the state court "improperly appl[ies]" or "in other words, unreasonably appl[ies] Federal law." 142 Cong. Rec. S7846 (June 7, 1995).

this Court made clear that AEDPA does not strip federal courts of the authority to review state court decisions, and reverse those state court decisions that violate the Constitution. *Williams*, 529 U.S. at 389. Specifically, this Court found that a state court decision that "seems entirely reasonable" at first glance, but upon review clearly involves "constitutional error," is "unreasonable" and therefore, should be reversed by the reviewing federal court. *Williams*, 529 U.S. at 389. The *Williams* decision mandates that when a "constitutional right has been violated," the state court decision *must* be reversed. *Id.* In *Williams*, this Court ultimately rejected the Fourth Circuit's narrow interpretation of AEDPA, which would only allow a federal habeas court to find a state court decision "unreasonable" when "all reasonable jurists would agree that the state court was unreasonable" because such a standard would effectively preclude federal courts from issuing writs under AEDPA. *Williams*, 529 U.S. at 377-78.

This Court rejected the Fourth Circuit's interpretation of AEDPA in *Williams*, which would require "federal judges, including [the Supreme Court], to defer to state judges' interpretations of federal law." *Williams*, 529 U.S. at 377. This Court directed that lower federal courts applying AEDPA are not to "defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody – or, as in [Williams' case], his sentence of death – violates the Constitution, *that independent judgment should prevail.*" *Williams*, 529 U.S. at 389 (emphasis added). The decision in *Williams* makes clear that it remains the "'province and duty of' [federal judges] to 'say what the law is.'" *Williams*, 529 U.S. at 378.

The Seventh Circuit clearly failed to live up to the mandate established in *Williams* when assessing Hardaway's confession – it did not allow its own

"independent judgment [to] prevail." Instead, the Seventh Circuit created its own standard of review under AEDPA and the *Williams* decision, holding that AEDPA's "unreasonable application" requirement meant that the state court decision being reviewed must be "something like lying well outside the boundaries of permissible difference of opinion." *Hardaway*, 302 F.3d at 762. Thus, the Seventh Circuit's interpretation of AEDPA gives too much deference to state court decisions, which was clearly not the intention of Congress. In fact, the standard applied by the Seventh Circuit in this case is simply a rewording of the Fourth Circuit's interpretation of the AEDPA that this Court rejected in *Williams*, which required that "all reasonable jurists" find the decision "unreasonable" before finding that AEDPA would allow a writ to be granted. More importantly, the standard articulated by the Seventh Circuit is different than the standard enunciated by this Court in *Williams*.

In fact, the Seventh Circuit did exactly the *opposite* of what this Court mandated in *Williams*. The Seventh Circuit assessed the Illinois court decisions regarding the voluntariness of Hardaway's confession, and found that Hardaway's confession was involuntary, and used against him at trial in violation of the Fifth Amendment of the Constitution. The Seventh Circuit, however, refused to affirm the district court decision reversing the Illinois courts, as this Court's ruling in *Williams* required. Even after finding that the evidence "strongly suggest[ed] that an injustice was committed" when Hardaway's confession was admitted at trial, the Seventh Circuit cited AEDPA's requirements as the *sole* basis for refusing to affirm the district court's decision. *Hardaway*, 302 F.3d at 759-60. In other words, the Seventh Circuit deferred to the Illinois courts' interpretations of the Constitution, rather than apply its own interpretation of the constitutional requirements of the Fifth Amendment, an approach that was specifically rejected by this Court in *Williams*. In sum, the Seventh Circuit did not obey this Court's directive in

the *Williams* decision that its "independent judgment should prevail" when it finds – as the Seventh Circuit found in this case – that a petitioner's constitutional rights have been violated.

B. The Seventh Circuit's Interpretation of AEDPA's "Unreasonable Application" Clause is Directly at Odds With Other Circuit Court Interpretations of the Clause.

The Seventh Circuit's interpretation of AEDPA conflicts with the Fifth, Third, Ninth, and Second Circuits' interpretations of AEDPA. All four of those circuits have interpreted the "unreasonable application" standard much more consistently with AEDPA, and this Court's decision in *Williams*, than the Seventh Circuit did in this case. In fact, all four of those circuits have interpreted AEDPA in a way that would require a federal habeas court to grant a writ upon a finding that a petitioner's constitutional rights were violated in state court proceedings, like the Seventh Circuit found in this case.

For example, the Fifth Circuit has concluded that this Court's decision in *Williams* evidences a clear intent for there to still be "stringent habeas review of state court decisions." *Gardner v. Johnson*, 247 F.3d 551, 560 (3d Cir. 2001). The Fifth Circuit found in *Gardner* that an "objectively unreasonable" application of federal law by a state court required reversal of that decision. *Gardner*, 247 F.3d at 560. The Fifth Circuit in *Gardner* further concluded that it "must reverse when [it] conclude[s] that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable'." *Gardner*, 247 F.3d at 560. The state trial court in *Gardner* found that the warnings of a psychiatrist – who evaluated the defendant for a court-ordered pretrial psychiatric examination – that a report would be sent to the court after the examination regarding his competency to stand trial and that "anything he might say could be used

against him . . . at some later date in the courtroom" were sufficient to adequately inform him of his Fifth Amendment rights against self-incrimination. *Gardner*, 247 F.3d at 555. The Fifth Circuit reversed, finding that the defendant in *Gardner* was not adequately informed of his right under the Fifth Amendment to refuse the examination and that the state court decision allowing admission of the psychiatrist's testimony was an "unreasonable application of . . . clearly established Federal law." *Gardner*, 247 F.3d at 563-64.

The Third Circuit has similarly interpreted the "unreasonable application" requirement in a manner more consistent with AEDPA, and this Court's decision in *Williams*, than the Seventh Circuit's interpretation in this case. *See Dunn v. Colleran*, 247 F.3d 450, 464 (3d Cir. 2001) (finding that a state trial court's denial of defendant's motion to withdraw guilty plea after prosecutor failed to fulfill promises made during plea negotiations was an "unreasonable application of . . . clearly established Federal law"); *Lam v. Kelchner*, 2002 WL 31012900, *5 (3d Cir. 2002) (finding that the state trial court decision denying defendant's motion to suppress was an "unreasonable application . . . of clearly established Federal law" because the "totality of the circumstances" in that case lead the Third Circuit to the conclusion that defendant's confession was involuntary); *Moore v. Morton*, 255 F.3d 95, 104-05 (3d Cir. 2001) (granting writ of habeas corpus when state court refused to grant defendant a new trial after prosecutor made inappropriate comments during closing arguments because state court decision involved an "unreasonable application of . . . clearly established Federal law"). More specifically, the Third Circuit has interpreted AEDPA to require the granting of a writ when "the state court came to a legal conclusion opposite that reached by the Supreme Court, or if the state court decided a case differently than the Supreme Court has on 'materially indistinguishable facts.'" *Dunn*, 247 F.3d at 457.

The Ninth Circuit has also applied a standard that is more consistent with this Court's decision in *Williams* than the Seventh Circuit did here. The Ninth Circuit has concluded that AEDPA requires a federal habeas court to reverse a state court decision when the federal court's "independent review of the legal question does not merely allow [the federal court] to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves [the federal court] with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law the court has adopted, was erroneous . . . . " *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000). Applying the *Van Tran* AEDPA standard of review, the Ninth Circuit found a state court had "unreasonably" applied federal law when it excluded a trustworthy hearsay statement that was critical to the defense. *Chia v. Cambra*, 281 F.3d 1032, 1037 (9th Cir. 2002).

Similarly, the Second Circuit has explained that AEDPA requires "more than an incorrect application, but the [habeas] petitioner need not show that all reasonable jurists would agree that a state court determination is incorrect in order for it to be unreasonable." *Young v. Walker*, 296 F.3d 129, 135 (2d Cir. 2002). In *Young*, the Second Circuit concluded that a federal habeas court should review a state court decision under an "objective reasonableness standard." *Young*, 296 F.3d at 135. The Second Circuit has further found that the "'increment of incorrectness need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.'" *Young*, 296 F.3d at 135 (quoting *Francis v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000)).

The Fifth, Third, Ninth, and Second Circuits' interpretations of AEDPA are undeniably more consistent with the decision in *Williams*, and the Act itself, than the

standard applied here by the Seventh Circuit. Moreover, application of the AEDPA standards as applied by those four circuit courts would certainly have led the Seventh Circuit to affirm the district court's grant of Hardaway's writ. Specifically, under the tests articulated by those four circuit courts, Hardaway's writ would have been granted once the federal habeas court made the determination made by the Seventh Circuit here – namely, that it would have found Hardaway's confession involuntary after evaluating the "totality of the circumstances" of Hardaway's confession in light of the decisions of this Court. Thus, at a minimum, this split among the circuits regarding the appropriate standard of review under AEDPA warrants this Court granting Hardaway's Petition for Writ of Certiorari.

C. The Illinois Courts' Decisions Involved "Unreasonable Application[s] of Clearly Established Federal Law."

The Seventh Circuit's determination that the Illinois courts did not "unreasonably" apply clearly established federal law is erroneous, and contrary to the well-established precedent of this Court regarding juvenile confessions. This case involves the exact circumstances section 2254(d) contemplated when it required that the state trial court's application of "clearly established Federal law" must be "unreasonable" before a writ will issue. There was clearly established federal law here – the decisions in *Haley* and *Gallegos* – that, as the district court found, *required* that Hardaway's writ be granted. In fact, it would be hard to find a case with facts more similar to *Haley* and *Gallegos* than the facts surrounding Hardaway's confession. In fact, the Seventh Circuit even admitted that Hardaway's cases was "quite similar to Gallegos." *Hardaway*, 302 F.3d at 763.

One look at the circumstances surrounding Hardaway's confession demonstrates that it was

involuntary. The decisions of this Court make clear that courts must take "special care" when assessing the voluntariness of juvenile confessions in light of the "totality of the circumstances." *See Haley*, 332 U.S. at 599-601; *Gallegos*, 370 U.S. at 54; *Gault*, 387 U.S. at 55. Thus, because adolescents are "easy victims of the law," see *Haley*, 332 U.S. at 599-601, and are "unable to know how to protect [their] own interests or how to get the benefits of [their] constitutional rights," *see Gallegos*, 370 U.S. at 54, such "special care" requires taking into consideration additional factors such as the juveniles age, maturity, education, experience, and the presence or absence of a parent or adult advisor. *Id.* Thus, this Court has mandated that "the greatest care must be taken to assure that the admission [of a juvenile] was voluntary." *Gault*, 387 U.S. at 55.[5]

Any properly conducted "special care" analysis *must* consider whether or not a parent or other friendly adult accompanied the child during the interrogation. In fact, in *Haley*, *Gallegos*, and *Gault*, this Court made clear that juveniles being interrogated need a parent, attorney, or other adult advisor present to compensate for their vulnerability and susceptibility to coercive police practices.[6]

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[6] This Court's recognition that adolescents should be treated differently than adults is well-supported by psychiatric and psychological evidence. Research into the competency of children to understand and knowingly and intelligently waive *Miranda* rights demonstrates that 14 year olds are less competent than adults to waive their rights. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1160 (1980)("As a class, juveniles younger than 15 years of age failed to meet both the absolute and relative adult standards for comprehension...[t]he vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of *Miranda* rights."); *see*

See Gault, 387 U.S. at 55 (a juvenile enduring interrogation "needs counsel and support if he is not to become the victim first of fear, then of panic."); *Gallegos*, 370 U.S. at 50 (a 14 year-old boy "would have no way of knowing what the consequences of his confession were without advice as to his rights – from someone concerned with securing him those rights"); *Haley*, 332 U.S. at 600 (finding 14 year-old boy's confession involuntary when he needed "someone on whom to lean" on during the interrogation because a child of that age would need "counsel and support" throughout the interrogation process).[7]

In *Gallegos*, the 14 year old suspect never saw a lawyer, his parents, or any other adult advisor during his interrogation. *Gallegos*, 370 U.S. at 54. This Court found in *Gallegos* that a juvenile:

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generally, Thomas Grisso and Robert G. Schwartz, *Youth on Trial, A Developmental Perspective on Juvenile Justice* (University of Chicago Press, 2000). Moreover, adolescents often act on impulse and during times of stress do not use their best judgment or decision-making skills, as one would expect from an adult. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, Criminal Justice (Summer 2000) at p. 27.

[7] Even federal statutory law now recognizes the necessity of allowing the parents of juvenile suspects the opportunity to confer with their children who are being interrogated. Specifically, 18 U.S.C. § 5033 requires that an officer taking a juvenile into custody "shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense." In *In re Wendy G.*, 255 F.3d 761, 766-67 (9th Cir. 2001), the Ninth Circuit found that 18 U.S.C. § 5033 required that parents be notified that they will be given the opportunity to advise and counsel their children before the interrogation begins.

> cannot be compared with an adult in full possession of his senses and knowledge of the consequences of his admission. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.

Gallegos, 370 U.S. at 54. This Court concluded that the absence of a parent, lawyer, or other friendly adult in *Gallegos* gave "the case an ominous cast." *Gallegos*, 370 U.S. at 54.

Furthermore, this Court in *Gallegos* found that a juvenile "needs counsel and support if he is not to become the victim of fear, and panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." *Id.* at 53. This Court further held that a 14 year-old is "unlikely to have any conception of what will confront him when he is made accessible only to police." *Id.* at 54. The Court stated that "[a]dult advice would have put [Gallegos] on less unequal footing with his interrogator . . . ." *Gallegos*, 370 U.S. at 54. Simply put, this Court made clear that a juvenile suspect needs a parent or other adult advisor present during interrogation because youth of *Gallegos*' age of 14 are "not equal to police in knowledge." *Id.*

As the district court correctly noted, this Court in *Haley* emphasized the fact that "no counsel or friend was

called during the critical hours of questioning." *Id.* at 600. Such "counsel and support" is needed if a juvenile being interrogated "is not to become first the victim of fear, then of panic." *Haley*, 332 U.S. at 599-601. The absence of a friend or counsel, along with "the age of the petitioner, the hours when he was grilled, the duration of his quizzing . . . and the callous attitude of the police toward his rights," led this Court to conclude that Haley's confession was involuntary. *Id.* at 600. In its decision suppressing the 15 year-old's statements in *Haley*, this Court emphasized the fact that five or six police officers interrogated the juvenile in "relays of one or two" for a period of five hours. *Haley*, 332 U.S. at 598.

The same "ominous cast" present in *Gallegos* is present here. Just as Gallegos, Hardaway was 14 years old when he was interrogated on September 1, 1994. Hardaway too, like *Gallegos*, never made a request to see one of his parents. Nonetheless, Hardaway had no friendly adult present to advise or protect him throughout the 14 hours he was at the police station being interrogated. Detectives did not permit Hardaway to speak with his parents, despite the fact that his father called Area 2 twice to inquire about Hardaway's well-being. The evidence presented showed that Mr. Hardaway's requests to go to the police station with Hardaway were refused and when Mrs. Hardaway called Area 2 to speak to Hardaway later that afternoon, those requests were also denied.

Despite the fact that it had the burden of proving that Hardaway made a knowing and voluntary waiver of *Miranda* rights, the State presented *no evidence* supporting such a finding.[8] The detectives took no precautions in

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[8] The Seventh Circuit concluded, *with absolutely no evidentiary support*, that Hardaway's prior contacts with the law somehow should "weigh against the normal presumption that youths are specially

explaining the *Miranda* warnings to Hardaway. The youth officer and assistant state's attorneys further failed to take any "special care" in explaining Hardaway's *Miranda* rights to him or take any steps to ensure that Hardaway understood his *Miranda* rights. Hardaway was not advised by any adult about the consequences of waiving his *Miranda* rights. Moreover, the detectives who interrogated Hardaway worked in "relay" teams – just as the detectives in *Haley* – and interrogated Hardaway in this fashion for over 14 hours.

In this case, the investigating officers and assistant state's attorneys who obtained Hardaway's confession ignored the "special care" requirement, essentially treating 14 year-old Hardaway as if he were an adult: (1) by not allowing him to consult with his parents throughout the 14 hours he was in police custody; (2) by not calling a youth officer the first eight hours he was at the police station; (3) by not allowing him to see a youth officer for eleven hours; (4) by providing a youth officer who acted like a "potted plant" throughout the interrogations he was present for; (5) by taking the first inculpatory statement at 4:30 p.m. from him with no parent, lawyer, adult friend, or youth officer present; (6) by having no parent or adult advisor present during the 7:00 p.m. and the 10:45 p.m. interrogations, and a youth officer who was inactive when he was present; and (7) by interrogating him in "relay fashion."

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sensitive to coercion." *Hardaway*, 302 F.3d at 767. There is simply no evidence that Hardaway's prior contacts with police or the court system made him more knowledgeable about his *Miranda* rights than the average 14 year old or had any impact on his understanding of *Miranda* rights. Moreover, the state did not present any evidence that Hardaway was better able to understand the consequences of waiving those rights, or that he was less susceptible to police coercion, than the average 14 year old.

As the district court correctly found, *Haley*, *Gallegos*, and *Gault* required a finding of involuntariness in this case. Simply put, Hardaway's case is identical to *Haley* and *Gallegos* when measured against the four factors that this Court relied upon when ruling that the confessions in those cases were inadmissible: (1) age; (2) lack of parent or adult; (3) length of interrogation preceding confession; and (4) the nature of the interrogation. Although the Seventh Circuit attempted to categorize it as such, this is not a case where one factor, such as age or lack of parent is the only factor indicating involuntariness. This case is one where, like *Haley* and *Gallegos*, *all* of the critical factors prove a violation of Hardaway's Fifth Amendment rights and mandate a finding of involuntariness. The Seventh Circuit refused to grant Hardaway's writ, despite acknowledging the similarities between Hardaway's case and both *Haley* and *Gallegos*, and strongly suggesting that it would find Hardaway's confession involuntary. *Hardaway*, 302 F.3d at 759-60.

The Seventh Circuit, however, attempted to minimize the significance of the decisions in *Haley* and *Gallegos* by arguing that this Court's decision in *Fare v. Michael C.*, 442 U.S. 707 (1979), somehow casts doubt upon the requirement that a friendly adult be present during a child's interrogation by police established in *Haley* and *Gallegos*.[9] This is simply an inaccurate reading of the *Fare* decision. There is nothing in the *Fare* decision that conflicts with, or curtails, the "special care" requirements established long ago by this Court's decisions in *Haley* and *Gallegos*. This Court addressed a separate and distinct

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[9] The Seventh Circuit further alluded that the fact that the *Gallegos*' decision has only been cited in two Supreme Court decisions somehow casts doubt on the precedential value of the decision, which makes no sense in light of the fact that the decision has never been overruled, or even questioned, by this Court in 30 years.

issue in *Fare* from that raised in the instant case. Specifically, this Court addressed in *Fare* whether a juvenile's request for his probation officer amounted to an invocation of his *Miranda* rights and whether the police officer's denial of the juvenile's request resulted in the juvenile's confession being involuntary. *Fare*, 442 U.S. at 724, 727.

This Court did not establish new standards for evaluating juvenile confessions in *Fare*, but merely reiterated that the "totality of the circumstances" must be assessed when making a determination regarding the voluntariness of a juvenile confession. *Fare*, 442 U.S. at 725. This Court once again stated that courts assessing juvenile confessions under the "totality of the circumstances" must "take into account those special concerns that are present when dealing with young persons, who often have limited experience, limited education and immature judgment." *Fare*, 442 U.S. at 725.

Moreover, the decision in *Fare* cannot control the outcome of this case because the facts of the interrogation there were entirely different from the facts of Hardaway's interrogation. The defendant in *Fare* was 16 and a half years old at the time of his interrogation. He had served time in a youth correctional camp, and had been on probation for over one year. Fare's interrogation was not lengthy. He was interrogated by only two police officers, not five officers in relays, like the interrogation Hardaway was subjected to. Finally, *Miranda* rights were explained to Fare by the officers in simpler terms than the typical *Miranda* warning. *Fare*, 442 U.S. at 710-11. Under "the totality of the circumstances," this Court found Fare's confession voluntary. *Fare*, 442 U.S. at 727. Thus, the Seventh Circuit's reliance on the *Fare* decision as a basis to discount the validity of the *Haley* and *Gallegos* decisions is misplaced.

A finding that Hardaway's case is meaningfully distinguishable from *Haley* and *Gallegos* would mean that the facts of a case would have to be virtually *identical* to the facts of one of this Court's cases, with a different outcome, before AEDPA would allow a federal court to grant a writ of habeas corpus. If that were the case, there would effectively be *no* federal habeas review, a proposition this Court explicitly rejected in *Williams*. The Seventh Circuit even acknowledged that:

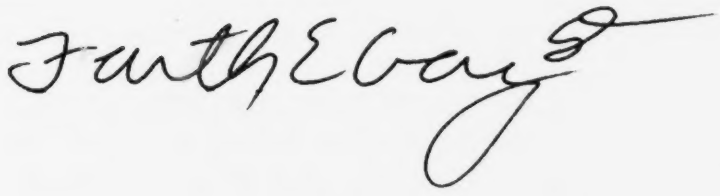
> [t]here is no doubt that Hardaway's youth, the lack of a friendly adult, and the duration of his interrogation are strong factors militating against the voluntariness of his confession; indeed, it seems to us that on balance the confession of a 14-year-old obtained in those circumstances may be inherently involuntary.

Hardaway, 302 F.3d at 767-68. The facts in this case, in light of the precedent of this Court, mandate a finding of involuntariness of Hardaway's September 4, 1994 statements, making the Illinois courts' decisions "unreasonable application[s] of . . . clearly established Federal law." Thus, it is critical that this Court grant certiorari to ensure that the circuit courts do not misapply AEDPA in a way that forecloses meaningful federal court review for state court petitioners, like Hardaway, whose constitutional rights have been violated, as the Seventh Circuit did in this case.

CONCLUSION

For the reasons set forth above, Petitioner Hardaway respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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United States Court of Appeals

For the Seventh Circuit
Chicago, illinois 60604
JUDGMENT - WITH ORAL ARGUMENT

Date: September 11, 2002

BEFORE: Honorable LILIANA DIAMOND ROVNER, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge
Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 01-3450

DERRICK HARDAWAY,
Petitioner - Apellee
V.
Petitioner
DONALD S. YONG, Warden,
Respondent - Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 01. C 3963, Milton I. Shadur, Judge

The judgment of the District Court is REVERSED,
in accordance with the decision of this court entered on this date.

(1061-110393)

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3450

DERRICK HARDAWAY,

Petitioner-Appellee,

v.

DONALD S. YOUNG, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 3963—**Milton I. Shadur**, *Judge.*

ARGUED NOVEMBER 26, 2001—DECIDED SEPTEMBER 11, 2002

Before ROVNER, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* At the age of 14, Derrick Hardaway confessed under police questioning to the murder of 11-year-old Robert Sandifer. An Illinois trial court denied Hardaway's motion to suppress his confessions as involuntary, and he was convicted of the crime and sentenced to 45 years in prison. After exhausting his state court remedies, Hardaway filed a petition for a writ of habeas corpus. The district court granted the petition, finding that in light of Hardaway's age, the lack of a friendly adult presence, and the length of the interrogation, Hardaway's confession was involuntary and suppression was required. Because we reluctantly conclude that the Illi-

nois courts' application of the totality of the circumstances test to Hardaway's confession was not an unreasonable application of clearly established Supreme Court precedent, we reverse the judgment of the district court. We do so, however, with the gravest misgivings and only in light of the stringent standard of review that applies under the applicable law, because we are convinced that the many other indicia under Illinois law of the special care that must be exercised with children as young as 14 strongly suggests that an injustice was committed here.

I

On August 28, 1994, 11-year-old Robert "Yummy" Sandifer, a member of the Black Disciples street gang in Chicago's Roseland neighborhood, shot and killed 14-year-old Shavon Dean and wounded two other children. Sandifer himself then disappeared. An intensive police search for Sandifer ensued until Sandifer's body was found under a viaduct at 108th Street and Dauphin Avenue shortly after midnight on September 1. He had been shot twice in the back of the head.

In the early morning hours of September 1, Cassandra Cooper telephoned the police and told them that Sandifer had been at her home around 11:30 p.m. the night before and that her daughter Jimesia saw Sandifer leave their porch with Hardaway and his older brother Cragg. At around 8 a.m., the police went to the Hardaway home. Hardaway was roused from sleep, told of the investigation, and, after conferring with his father, agreed to accompany the officers to the police station to help with the investigation. Hardaway's father was offered a ride to the station but declined, choosing instead to wait for his son Cragg to return home. Hardaway dressed and was transported to the police station unhandcuffed and placed in an unlocked interview room at about 8:30 a.m.

Two detectives, Robert Lane and Romas Arbataitis, questioned Hardaway at that time. Hardaway admitted to knowing Sandifer but stated that he had last seen him three days earlier. The detectives then left the interview room and Arbataitis spoke to Jimesia, who confirmed her mother's report that Sandifer and Hardaway had been together that very night. Jimesia said that Hardaway had approached Sandifer and another boy, Mike Griffin, who were both sitting on the porch of her home, and told Sandifer "that he had to go with Derrick, that [Cragg] and the boys wanted to take him out of town."

At about 10:30 a.m., the detectives interviewed Hardaway for a second time. This time they read him his *Miranda* rights and confronted him with Jimesia's statements. Hardaway then changed his story, essentially admitting to Jimesia's version of events. He said that Sandifer and Griffin followed him off the porch and went to a waiting car, driven by Cragg. Cragg then drove off with Sandifer while Hardaway and Griffin walked home. The detectives' conversation with Hardaway lasted about 15 minutes and he was then left alone in the interview room. Over the next six hours he was briefly questioned on matters such as the name of Cragg's girlfriend, provided with lunch, and occasionally checked on. Most of his time, however, was spent alone.

During the afternoon, Griffin was located and interviewed by the police. He confirmed that he and Sandifer walked to Cragg's car but stated that Hardaway had gotten into the car with Sandifer and that the brothers had refused to give Griffin a ride home because "they were in too deep." At 4:30 p.m., two new detectives, John McCann and James Oliver, reiterated the *Miranda* warnings and then interviewed Hardaway, who repeated his story. McCann informed Hardaway that Griffin had said something different and walked him down the hall to show him that Griffin was in another interview room. At

that point, Hardaway admitted that he did get into Cragg's car with Sandifer and that he was present when Cragg shot Sandifer under the viaduct shortly thereafter.

Questioning then ceased while an Assistant State's Attorney, Theresa Harney, and a youth officer, James Geraci, were contacted. At approximately 7:00 p.m., McCann, Harney, and Geraci met with Hardaway. Harney told Hardaway that Geraci was a youth officer and that he was present as an observer and to assist Hardaway if he had any questions or problems. Geraci then asked Hardaway if there was anything he could assist him with, to which Hardaway responded no. From that point onward, Geraci did absolutely nothing to assist Hardaway. Harney read Hardaway his *Miranda* rights yet again and informed him again that he could be tried as an adult. Hardaway then explained his rights back to Harney in his own words, stating that he did not have to speak with Harney if he didn't want to, that anything he told Harney she could tell a judge in a trial against him, that he could have an attorney there when he was questioned about the case, even if he or his family couldn't pay for one, and that his case could be moved out of juvenile court to adult court if the judge decided.

Hardaway gave a statement to Harney in which he again confessed to the crime and then agreed to repeat the statement to a court reporter. Another break was taken until the court reporter arrived at 10:45 p.m. At that time, Hardaway admitted that he and Cragg had been ordered by the leader of the Black Disciples to get rid of Sandifer, that he approached Sandifer on the Coopers' porch and brought him back to Cragg's car, that he accompanied Cragg and Sandifer to the viaduct, and that he watched out for police while Cragg shot Sandifer.

The state courts found that Hardaway's parents never tried to come to police headquarters to see their son, and

Hardaway never asked for his parents or for an attorney. He was not physically abused or threatened by the detectives in any way. Hardaway had 19 previous arrests for charges including robbery, attempted criminal sexual assault, unauthorized use of a weapon, and delivery of a controlled substance, but he had never faced anything as serious as a murder charge. He had appeared in juvenile court with appointed counsel on seven occasions; there is no evidence, however, whether he had ever been advised of his *Miranda* rights on those occasions, and it appears that he had little or no experience in the adult criminal justice system.

Hardaway moved to suppress his confession. The trial court denied the motion, finding that the police had never prevented Hardaway from seeing his parents or an attorney; that a youth officer was present to assist Hardaway at his last two confessions; that there were no threats or abuse; that there was no evidence Hardaway suffered from any mental incapacity or handicap; and that he was already more familiar with the criminal justice system and with attorneys than most ordinary adult citizens would be in light of his numerous prior court referrals. It therefore found the confession to be voluntary under the totality of the circumstances. The Illinois Appellate Court affirmed and the Illinois Supreme Court denied review, leading to this timely petition for a writ of habeas corpus.

II

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, governs the grant of a writ of habeas corpus here, because Hardaway's petition was filed after the effective date of that statute. Before a writ may issue, a federal court must find that the challenged state court decision is either "contrary to" or "an

unreasonable application of" clearly established federal law as determined by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). The district court found (and Hardaway here concedes) that the decision to admit the confession was not contrary to clearly established federal law; it instead focused on the unreasonable application inquiry. "A state court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established Federal law.'" *Id.* at 407-08. A state court decision must be more than incorrect from the point of view of the federal court; AEDPA requires that it be "unreasonable," which means something like lying well outside the boundaries of permissible differences of opinion. *Id.* at 411. We review the findings of both the state and district court "*de novo* but with a grant of deference to any reasonable state court decision." *Anderson v. Cowan*, 227 F.3d 893, 897 (7th Cir. 2000).

The voluntariness of a confession, whether made by a juvenile or an adult, is evaluated on the basis of the totality of the circumstances surrounding that confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). In juvenile cases, the totality approach requires an "evaluation of the juvenile's age, experience, education, background, and intelligence" as well as the circumstances regarding the confession. *Fare*, 442 U.S. at 725. The Supreme Court in the past has spoken of the need to exercise "special caution" when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult. *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948). In this case, the trial court correctly recognized that it was re-

quired to apply a totality of the circumstances analysis and also stated, "I do realize and I do take into consideration that the defendant is a juvenile. And that this court must take great care to insure that the admission was voluntary." The Illinois Appellate Court also stated that it would scrutinize the juvenile confession "with particular care." *People v. Hardaway*, 718 N.E.2d 682, 693 (Ill. App. Ct. 1999). Notwithstanding these protestations, the district court found that the analysis of both state courts was an unreasonable application of the totality of the circumstances test in light of *Haley*, *Gallegos*, and *Gault*, and it therefore issued the writ.

The district court had good reason for doing so, in that it relied on several Supreme Court decisions that had held that the Fifth Amendment rights of a juvenile had indeed been violated. In *Haley*, a 15-year-old boy was arrested at midnight and interrogated for five straight hours by six officers in relays of one or two officers at a time. At 5 a.m., after being falsely told that two other boys had implicated him, the defendant confessed. *Haley*, 332 U.S. at 598. He was then held for three more days before being charged while his mother and an attorney she had retained were rebuffed in attempts to see him. *Id.* The Supreme Court found this confession involuntary because "[t]he age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction." *Id.* at 600-01. Hardaway's case is less egregious, in that there were no efforts to keep his parents away or to confront him with false testimony, and he was held for less than one day rather than three. There were also lengthy breaks in the interrogations, rather than the five grueling hours that Haley was forced to endure.

Gallegos, in contrast, is closer to the mark. In that case, a 14-year-old boy was arrested on assault and robbery charges; he "immediately" admitted to the crime. *Gallegos*, 370 U.S. at 50. After his arrest, he was locked for five days in juvenile hall, where his mother was not permitted to see him. He signed a full and formal confession at the end of the week. During that time, he never asked to see his parents or an attorney. The Court admitted that there was no prolonged questioning or use of fear to break down the defendant, but it found that under "the totality of the circumstances" the five-day detention and refusal to permit the boy's mother to see him gave the case an "ominous cast." *Id.* at 54. It concluded that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police . . . . He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights." *Id.* The Court therefore found that the formal confession had to be suppressed. *Id.* at 55.

In many respects, this case is quite similar to *Gallegos*. Like Gallegos, Hardaway was only 14 at the time of his arrest. He was questioned for a longer time than Gallegos before his first confession, and no friendly adult was present to explain his rights to him until many hours later (even if we assumed that the passive Geraci served that function). Thus, reading the *Gallegos* decision in isolation, we would likely affirm the district court's judgment.

Later decisions, however, indicate that the mere absence of a friendly adult is by itself insufficient to require suppression of a juvenile confession. In *Fare*, the Supreme Court held that a totality of the circumstances analysis was adequate "to take into account those special concerns that are present when young persons, often

with limited experience and education and with immature judgment, are involved." 442 U.S. at 725. Turning to the specific facts of the case before it, the Court found voluntary the confession of a 16-year-old with a prior criminal record and no signs of insufficient intelligence who had been subjected to no threats, intimidation, or trickery, despite the absence of a friendly adult. *Id.* at 726-27. Since *Fare* was decided, *Gallegos* has been cited just twice by the Supreme Court, both times as support for a "totality of the circumstances" or "compound influence" analysis to analyzing the voluntariness of confessions. See *Dickerson v. United States*, 530 U.S. 428, 434 (2000); *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

The Illinois state courts knew that they were supposed to apply a totality of the circumstances approach when evaluating Hardaway's claims, and they claimed to have done so. The district court agreed that the state courts used the correct test (and thus were not acting "contrary to" applicable law), but that they did so unreasonably by failing adequately to consider three factors: Hardaway's age; the *de facto* absence of a friendly adult; and the length and nature of the interrogation.

Age is clearly a relevant factor in this case, as it is in many areas of the law. Children under the age of 16 are treated differently from adults under Illinois law in a host of different ways. They may not marry, 750 ILCS 5/208, vote, 10 ILCS 5/3-1, serve on a jury, 705 ILCS 305/2, or make a will, 755 ILCS 5/4-1. Restrictions are placed on their ability to work, 820 ILCS 205/1, to smoke, 720 ILCS 675/1, to operate a motor vehicle, 625 ILCS 5/6-107, to withdraw from compulsory education, 105 ILCS 5/26-1, and to travel outdoors between midnight and 6:00 a.m., 720 ILCS 555/1. They cannot purchase airline tickets, 720 ILCS 5/10-8, consent to medical care, 410 ILCS 210/1, attend a raffle, 230 ILCS 15/4, or pierce their bodies, 720 ILCS 5/12-10.1, without parental permission. See also *United*

States v. Shannon, 110 F.3d 382, 386 (7th Cir. 1997) (noting various state limitations on ability of minors to consent to sexual activity with adults). It is thus somewhat incongruous that the state of Illinois believes that children, in whose decisions the state has so little confidence in other areas, should be subjected to questioning for major crimes they are suspected of having committed without the continuous presence and assistance of a friendly adult.

The Constitution too affords children rights that cannot always be equated with those of adults. See, *e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *Gault*, 387 U.S. at 13. Constitutional distinctions between minors and adults are recognized for three reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). Thus, children may be required to consult with a parent or other friendly adult before obtaining an abortion, *id.* at 640, and they may in some circumstances be tried in juvenile court proceedings without a jury trial or certain other precautions, but also without risk of the imposition of adult punishments, to be served in adult institutions. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), *Gault*, 387 U.S. at 30.

The difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated. Indeed, Hardaway argues that we should interpret *Gallegos* to impose a *per se* rule that no child under the age of 16 may waive his rights or make a voluntary confession without a parent or guardian present. We consider this an extremely close question, but we conclude in the end that we are foreclosed from pursuing that path. In the first place, the *Fare* decision, decided nearly two decades after *Gallegos*, makes quite clear that all juvenile

confessions are to be assessed under the totality of the circumstances standard, and that no one factor will be dispositive. *Fare*, 442 U.S. at 725-27.

Since the defendant in *Fare* was 16, it might be possible to impose a *per se* rule at a lower age, such as 14, or 10, or 5. Some state laws, such as those regarding employment, marriage, and operation of a motor vehicle, routinely make distinctions between those over and under age 16, and the Supreme Court has recognized such a distinction as a constitutional matter under the Eighth Amendment in regard to the death penalty. Compare *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding execution of 16-year-old) with *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (prohibiting execution of 15-year-old). But there is no support in clearly established Supreme Court precedent for extending this isolated example to the Fifth Amendment context. Even *Gallegos* relied heavily on the "compound of . . . influences" and "totality of circumstances," including the failure to notify the defendant's mother, the length of his detention, and the failure to bring him timely before a juvenile court judge, rather than on age alone. *Id.* at 55. Also cutting against a *per se* rule (at least as to children of Hardaway's age) is the fact that this court has itself upheld on habeas review a murder conviction based on the uncounseled confession of a 14-year-old. *Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994). Although we may not apply a *per se* rule, youth remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession. *Id.* at 642.

Keeping Hardaway's extreme youth in mind, we turn to the second factor in our analysis: the fact that there was no friendly adult presence to guard against undue police

influence. Hardaway's parents chose not to come to the station with him, and he never requested an attorney. The state courts did note that Youth Officer Geraci was present at the 7:00 and 10:45 p.m. statements, but we agree with the district court that this fact is meaningless. As far as the record shows, Geraci provided about as much assistance to Hardaway as a potted plant. (Although it is true that Geraci might have served as a substitute for a videotape, there is no assurance that he would have been as reliable as a tape, even acknowledging that tampering is a risk with tapes. Tampering of a sort can also happen with live witnesses, either unintentional or intentional: a person is subject to memory lapses, and could even have an incentive to support the police version of events.) When Geraci first entered the room he informed Hardaway that he was there to help him and would assist him if he had any questions. There is no difference between this statement and what any other police officer, such as the "good cop" in a good cop/bad cop routine, might say to a suspect. The fact that Geraci then remained mute while Harney and McCann questioned Hardaway at length further shows he was doing little more than fulfilling the minimum requirements imposed by state law. We wish to make it clear that a state-provided youth officer who functions as nothing more than an observer will not be considered a friendly adult presence for purposes of the totality of the circumstances test. *Cf. People v. McDaniel*, 762 N.E.2d 1086, 1097-98 (Ill. App. Ct. 2001) (reversing conviction under state law where youth officer took no interest in protecting defendant's welfare).

Despite this fact, the absence of a friendly adult at Hardaway's confession cannot be deemed dispositive. "[N]either federal statutory nor constitutional law requires that a juvenile's parents be notified prior to obtaining a confession." *Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996). Even refusing a child's request to have a parent or other

friendly adult (other than a lawyer) present is not enough to suppress the confession if other factors indicate that the confession was voluntary, and Hardaway made no such request here. *Fare*, 442 U.S. at 718; *United States ex rel. Riley v. Franzen*, 653 F.2d 1153, 1162-63 (7th Cir. 1981). However, "in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission." *United States v. Wilderness*, 160 F.3d 1173, 1176 (7th Cir. 1998); see also *Johnson*, 28 F.3d at 644-45 (finding interrogation of 14-year-old while mother was also being held in custody did not violate the Due Process Clause).

We therefore must operate under the following procedural framework: the mere fact that Hardaway was 14 and questioned without an adult present does not by itself render his confession involuntary, but it does require that a court conduct a searching review of the facts to ascertain whether any undue intimidation or other forms of pressure caused him to confess involuntarily. The district court identified only one such factor, the duration of the interrogation. Hardaway was initially brought to the police station at 8:30 a.m. and briefly interviewed. By 10:30 a.m. he was considered a suspect, had received his *Miranda* warnings, and had been questioned again for another 15 minutes, at which time he changed his story slightly. At that point he was left more or less alone for over five hours. At 4:30 p.m., Hardaway was notified that Griffin was telling police a different story, and he then confessed. That interrogation took about one hour. Another delay ensued while Harney was contacted, and she then joined the police in interrogating Hardaway from 7:00 to 8:00 p.m. Hardaway was detained again while a court reporter was located to take a transcribed statement from 10:45 p.m. until midnight. The statements made by Hardaway at 4:30, 7:00, and 10:45 p.m. were in all material respects identical.

It is thus somewhat misleading for Hardaway to contend that he was interrogated for 16 straight hours by "relays" of officers and deprived of sleep. We fail to understand why Hardaway should have been provided a place to sleep between the hours of 8:30 a.m. and 4:30 p.m. when most eighth graders would not be sleeping anyway. The mere fact that two officers questioned Hardaway twice in the morning and two different officers spoke to him at 4:30 p.m., with a total interrogation time prior to the initial confession of less than 90 minutes, presents a markedly different scenario from the five grueling hours of interrogation experienced in *Haley*. 322 U.S. at 598. The police used no particularly coercive or heavy-handed interview techniques, such as making Hardaway strip and wear jail clothes or handcuffs, questioning him for lengthy periods without a break, misrepresenting evidence, or showing graphic pictures of the murder scene. See *Woods v. Clusen*, 794 F.2d 293, 296 (7th Cir. 1986) (granting writ on the basis of evidence of such mistreatment); *Riley*, 653 F.2d at 1162-63 (denying writ where defendant was handcuffed and given jail clothes but there was no evidence of mistreatment and interview only lasted four hours). Instead, the officers merely asked Hardaway a few questions about his whereabouts and truthfully confronted him with the statements of two witnesses whose versions of events contradicted his own. We cannot find that the state court's determination that this was not unduly coercive behavior on the part of the police was unreasonable, even when dealing with a 14-year-old.

One could still argue that leaving a juvenile alone in an interrogation room for eight hours creates enough psychological pressure to render the confession involuntary. Obviously, adolescents are less mature than adults and perhaps such a time lapse, which we would expect an adult to weather, would instead render involuntary the confession of a child, especially one deprived of any adult assistance.

If we were a state appellate court, we might well find that on balance the psychological tension caused by leaving a boy of 14 alone in an interview room, hungry, scared, and tired, was enough to exclude the confession. But we may set aside the contrary findings of the Illinois trial and appellate courts only if their determination was unreasonable. *Williams*, 529 U.S. at 411. As the state courts pointed out, there are arguments that pass the lenient test of "reasonableness" in favor of finding the confession voluntary.

First, Hardaway was not intimidated, abused, or physically coerced in any way. A photograph taken at the time of the confession substantiates this fact. Hardaway was not psychologically tricked into confessing by officers but only confronted with truthful contradictory evidence.

Second, Hardaway had extensive prior history with parts of the criminal justice system. Prior to the Sandifer murder Hardaway had been arrested 19 times between 1992 and 1994 and charged with four counts of battery, three counts of criminal trespass to vehicle, two counts of aggravated battery, two counts of robbery, criminal damage to property, attempted criminal sexual assault, disorderly conduct, assault, possession of a controlled substance, unauthorized use of a weapon, possession of marijuana, and delivery of a controlled substance. Three of the complaints were adjusted in complaint screening, and seven were station adjustments. Hardaway had been placed on juvenile supervision, but had violated that supervision. Seven times Hardaway had appeared in juvenile court with appointed counsel. As the state courts recognized, past brushes with the law weigh against the normal presumption that youths are specially sensitive to coercion. *Wilderness*, 160 F.3d at 1175; *Johnson*, 28 F.3d at 645.

It is true that there is no evidence that Hardaway had ever received *Miranda* warnings at any of these 19 ar-

rests. However, based on the seriousness of the charges in many of those counts, we cannot conclude that the circuit court was unreasonable in weighing Hardaway's frequent police encounters and general familiarity with the criminal justice system in favor of the confession's voluntary nature.

Finally, Hardaway appeared to law enforcement officials to understand his rights when they were read to him. At the beginning of his court-reported statement he claimed to understand those rights and waived them. He also explained his rights back to Harney in his own words. To Hardaway, the right to silence meant "he didn't have to talk if he didn't want to." Hardaway also stated that anything he told assistant state's attorney Harney she could tell a judge in a case against him. As for the right to an attorney, he said that this meant that he could have a lawyer there when Harney questioned him about the case, and he could have one even if he and his family could not pay for one. This recitation indicates that there was adequate support for the state court finding that Hardaway did have at least a basic comprehension of his rights. As the trial judge noted, there is no indication that Hardaway, whose test scores showed an IQ of 95 and the educational performance of an average sixth-grader, had mental incapacities or other infirmities that would make him incapable of understanding his rights. See *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (upholding waiver of rights by mentally retarded, illiterate 16-year-old).

There is no doubt that Hardaway's youth, the lack of a friendly adult, and the duration of his interrogation are strong factors militating against the voluntariness of his confession; indeed, it seems to us that on balance the confession of a 14-year-old obtained in those circumstances may be inherently involuntary. Nevertheless, the weighing of factors under the totality of circumstances

test is a subject on which reasonable minds could differ. Here the trial court stated that it weighed all relevant factors, and after doing so it concluded that the lack of any apparent coercion by the police, Hardaway's recitation of his rights, his mental capacity, and his past experience with the criminal justice system on balance rendered his confession voluntary and admissible. Even assuming that the weighing of factors by the Illinois state courts in this case was incorrect, the balance is close enough that, in the final analysis, it is not unreasonable. *Williams*, 529 U.S. at 411. Keeping in mind our deferential standards of review under AEDPA, we are compelled to defer to the findings and the conclusion of the state courts.

III

Because the determination of the Illinois courts that Hardaway's confession was voluntary under the totality of the circumstances was not an unreasonable application of clearly established federal law, the district court should not have granted the writ of habeas corpus. For the foregoing reasons, the judgment of the district court is REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
DERRICK HARDAWAY #K65596,

Petitioner,

v.

DONALD S. YOUNG, WARDEN,

Respondent.

No. 01 C 3963

DOCKETED
SEP 14 2001

MEMORANDUM OPINION AND ORDER

On May 29, 2001 Derrick Hardaway ("Hardaway") filed a Petition for Writ of Habeas Corpus ("Petition") under 28 U.S.C. §2254[1] to challenge his November 1, 1996 first-degree murder conviction on which he is currently serving a 45-year sentence.

In accordance with Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), this Court promptly reviewed the Petition and its attachments. That threshold review prompted the issuance of a June 4 memorandum order because the Petition posed issues that could not be evaluated from that filing alone. That being so, this Court

(1) ordered Warden Donald Young ("Respondent") to file a responsive pleading in accordance with Section 2254 Rule 4 and

(2) appointed Thomas Geraghty, Esq. to act pro bono publico as

[1] All further references to Title 28's provisions will simply take the form "Section--."

Hardaway's counsel. [2] Then, after reviewing Respondent's Answer to the Petition and accompanying Exhibits (cited "Ex. --"), this Court found that a reply memorandum was required.That is now in hand. All of the filings to date have made it clear that the Petition is amenable to disposition on those papers, without the need for an evidentiary hearing (see Section 2254 Rule 8(a)). For the reasons stated in this memorandum opinion and order, Hardaway's Petition is granted.

Facts Under Section 2254(e) (1) the state court's findings of fact are presumptively correct in any federal habeas proceeding.

Accordingly, this opinion draws from the recitation of the facts in the Illinois Appellate Court's direct review of Hardaway's conviction, reported at 307 Ill. App. 3d 592, 594-603, 718 N.E.2d 682, 685-91 (1st Dist. 1999). Because that opinion's factual recitation is understandably much more extensive and intermingles matters relevant to the current inquiry with facts bearing on Hardaway's trial and conviction, what follows is a distillation of the currently relevant facts rather than (as this Court has done in other habeas cases) a verbatim reproduction of the

[2] Indeed, attorney Geraghty had not only handled all of Hardaway's state court proceedings but had also prepared the memorandum of law accompanying the form Petition (even though the filing was nominally made pro se).

Appellate Court's statement. At 8 a.m. on September 1, 1994 three Chicago police detectives went to Hardaway's home to question him (he was then 14 years old) and his brother Cragg (who was then age 16) in connection with the death of ll-year-old Robert Sandifer ("Sandifer") the night before.
Encountering Hardaway's father, the detectives explained that they had information that his sons had been seen with Sandifer shortly before his murder.
Hardaway's father woke him and brought him to the living room to
talk with the detectives (Cragg was not then at home).Hardaway agreed to accompany the detectives to the police station to help with the investigation. Although the detectives offered to give Hardaway's father a ride to the station along with Hardaway, the father declined in order to wait at home for his other son. [3] Before they left, the detectives gave Hardaway's father their card and phone number and told him the location of the police station. At that time the detectives did not read Hardaway his Miranda rights or tell him that he was a suspect.
Two detectives interviewed Hardaway shortly after he arrived at the police station at about 8:30 a.m. Hardaway was still not read his Miranda rights. In that interview Hardaway admitted he

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[3] At trial Mr. Hardaway testified that the police had refused to permit him to accompany his son to the station. Because the trial court made a finding of fact rejecting that testimony, a finding that the Appellate Court upheld, the version
set out in the text here controls.

knew Sandifer but said that he had not seen Sandifer for three days. Detectives then interviewed Jimesia Cooper, a neighbor of Hardaway's, who said that Hardaway had left her house the night before in the company of Michael Griffin and Sandifer. Sandifer's body had been found an hour after Cooper said they had left her house. At about 10:30 a.m. detectives questioned Hardaway for the second time. Hardaway repeated that he had not seen Sandifer for three days. Hardaway was then informed of his Miranda rights and advised that if he was charged in the case he could be transferred from juvenile court and tried and sentenced as an adult. After the detectives confronted Hardaway with Cooper's statements, Hardaway said that the previous night his brother Cragg had told him to go get Sandifer and that Cragg then drove off with Sandifer alone, leaving Hardaway and Griffin behind.At that point Hardaway was placed under arrest. Detectives neither notified Hardaway's parents that Hardaway was under arrest nor communicated with a youth officer.

Throughout the day detectives repeatedly went to the Hardaway home in search of Cragg Hardaway. While there detectives spoke with Hardaway's parents, who continued to remain at home waiting for their other son. Hardaway's parents phoned the police station twice (at noon and at 8 p.m.) to inquire about Hardaway.

Detectives first requested a youth officer for Hardaway at about 4 p.m., fully 9 hours after he had been taken into the station and 5-1/2 hours after his arrest. No youth officer was assigned at that time, however.At 4:30 p.m. detectives began a third interview of Hardaway, though still with no youth officer present. Detective McCann again read Hardaway his Miranda rights and advised him that if he was charged he could be tried as an adult. McCann then told Hardaway that Griffin had contradicted Hardaway's story, and he took Hardaway to a room where he could see that Griffin was at the station. Hardaway then admitted (1) having gotten into the car with Sandifer and his brother Cragg and (2) that he had been present when Cragg shot Sandifer shortly thereafter. At 7 p.m. Detective McCann interrogated Hardaway again, this time accompanied by Assistant State's Attorney Theresa Harney ("Harney"). For the first time Youth Officer Geraci ("Geraci") was also present. Harney explained to Hardaway that Geraci was a youth officer and that he was present "as an observer to assist [Hardaway] if he had any questions or any problems." Geraci asked Hardaway if there was anything he could assist him with, and Hardaway told him "no." Harney read Hardaway his Miranda rights and had Hardaway explain to her what his rights meant.Harney also told Hardaway that if he was charged in connection with the murder of Sandifer he could be tried and sentenced as an

adult. Hardaway then repeated his 4:30 p.m. admissions. Geraci observed Hardaway and said later that the latter was not intimidated or abused in any way, but he made no effort to speak with Hardaway alone.Finally, at 10:45 p.m. Hardaway (who had then been in custody over 14 hours and had been under arrest for the last 12 hours of that period) began to give a 22-page court-reported statement in the presence of McCann, Geraci and Harney. Hardaway gave a full confession to his participation in the murder, completing his statement at midnight.

Procedural History

On December 6, 1994 the Juvenile Division of the Circuit Court of Cook County granted the State's petition to prosecute Hardaway as an adult (Ex. A-16 at 25). Before trial Hardaway moved to quash his arrest, to suppress any evidence obtained as a result of the arrest and to suppress his inculpatory statements on the ground that they were involuntary. Denying those motions, the trial court found that the police had probable cause to arrest and that Hardaway's statements were voluntarily given under the totality of the circumstances. In the ensuing jury trial Hardaway was found guilty of the first-degree murder of Sandifer and sentenced to 45 years in prison. Hardaway's court- reported confession provided key evidence of his role in the crime.

After his jury trial and sentencing, Hardaway appealed his conviction to the Illinois Appellate Court. On September 10, 1999 his conviction was affirmed in the earlier-cited published opinion and an accompanying unpublished Rule 23 order (Ex. D). Hardaway next filed a Petition for Leave To Appeal to the Illinois Supreme Court (Ex. E). Leave was denied in that court's Docket No. 88421 on May 31, 2000 in the typical one-sentence order (Ex. F, reported in table at 189 Ill. 2d 668, 731 N.E.2d 767). That final disposition renders this May 29, 2001 Petition timely under the one-year limitation period prescribed by Section 2244(d) (1) (A).

Hardaway's Petition advances only one contention that he claims entitles him to federal habeas relief, asserting that his Fifth Amendment right[4] to be free from compelled self-incrimination was violated when involuntary statements were used against him at trial. Hence this opinion focuses on the voluntariness or involuntariness of those statements in constitutional terms.

Procedural Framework

Before any federal court can address the merits of a Section

[4] As always, this opinion adheres to the conventional and convenient (though technically imprecise) practice of referring to the underlying Bill of Rights provision (which of course imposes limitations only on the federal government) rather than the Fourteenth Amendment (which applies to state actors and has been construed to embody such Bill of Rights guaranties).

2254 petition, the petitioner must have both exhausted his state court remedies and avoided any fatal procedural defaults (Section 2254(b) (l); Bocian v. Godinez, 101 F.3d 465, 468 (7th Cir. 1996)). Here there is no question as to Hardaway's satisfaction of the first of those requirements, for he "g[a]ve the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" (O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)) .

That being so, this opinion turns to the separate doctrine of procedural default. Procedural default occurs in one of two situations: Either (1) a petitioner failed to present the federal constitutional issue fairly to the state courts before raising it in the federal habeas proceedings (Spreitzer v. Schomiq, 219 F.3d 639, 644-45 (7th Cir.2000)) or (2) the state court rejected the claim on an independent and adequate state law ground (Coleman v. Thompson, 501 U.S. 722, 729 (1991)). If barred on procedural default grounds, a claim will not be cognizable in federal habeas proceedings unless the petitioner can clear one of two hurdles established by Coleman, id. at 750: [T]he prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Any claims that manage to survive those threshold and

intricate procedural obstacles must then satisfy Section 2254's stringent standards for granting habeas relief on claims that state courts have considered and rejected on their merits. Here is Section 2254(d) :

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Williams v. Taylor, 529 U.S. 362, 402-13 (2000) has recently provided the definitive parsing of the dual standard embodied in Section 2254(d) (1): To succeed, a petitioner must show either (a) that the state court applied a rule contradicting Supreme Court precedent that was clearly established as of the time the state conviction became final or (b) that the state court unreasonably applied a clearly established Supreme Court principle to the facts of petitioner's case (see also Washington v. Smith, 219 F.3d 620, 627-28 (7th Cir. 2000)).

Procedural Default

As already stated, Hardaway's sole asserted ground for federal habeas relief is that he was denied his Fifth Amendment

rights when involuntary statements were used against him at trial (H. Mem. 1). [5] As a preliminary matter, Respondent has argued that Hardaway procedurally defaulted his claim as to his 10:30a.m. and 4:30 p.m. statements under the independent-and-adequate-state-law-ground rule. [6]

Although Hardaway made a pretrial motion to suppress all of his Statements and raised that issue again in a motion for a new trial after the verdict, the Illinois Appellate Court found that Hardaway had waived any challenge to the voluntariness of those statements on appeal. [7] Applying People v. Enoch, 122 Ill.2d 176, 186, 522 N.E.2d 1124, 1130 (1988), the Appellate Court concluded that under Illinois law both an objection at trial and a written post-trial motion are necessary to preserve a claimed trial court error for review. Thus the court ruled that Hardaway had waived any challenge to his 10:30 a.m. and 4:30 p.m. statements by failing to object during the trial to testimony regarding those

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[5] Because his memorandum of law accompanying his Petition lacks pagination, this Court has numbered its pages beginning with the first page following the still-unnumbered cover page.

[6] Hardaway does not challenge the voluntariness of his 8:30a.m. statement.

[7] What was really meant, of course, was that Hardaway had forfeited (not waived) his right to advance such a challenge-- there was surely nothing voluntary about any claimed surrender of that right on his part (see, e.g., the discussion in United-States v. Cooper, 243 F. 411, 415-16 (7th Cir. 2001)). But this opinion will adhere, as most cases do, to the common (though inexact) usage that employs "waiver" to describe the loss of a right to assert a legal argument.

statements. Waiver is an independent and adequate state procedural ground for dismissal (Aliwoli v. Gilmore, 127 F.3d 632, 634 (7th Cir. 1997)). Federal courts are generally bound by a state court's finding of waiver under its own law (White v. Peters, 990 F.2d 338, 340 (7th Cir. 1993)). If a state ground is not followed strictly, it will still be respected as long as it is "solidly established" (Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990), quoted in White). But an "infrequently, unexpectedly, or freakishly" applied state procedural bar does not constitute an "adequate" basis for precluding habeas review (id. at 1383; see also Johnson v. Mississippi, 486 U.S. 578, 587 (1988)). When a state court "chooses to ignore the fact that the petitioner has fully complied with the state's articulated procedural rules and simply deems the petitioner's claim waived," federal courts are not bound by the state court's finding of waiver (Williams v. Lane, 826 F.2d 654, 660 (7th Cir. 1987)). Illinois does not have a "solidly established" rule requiring defendants to object during the trial to the admission of a confession when--as was done here--they have already raised the issue in a pretrial motion to suppress. Enoch, the case cited by the Illinois Appellate Court, does not really address

that issue as such. [8] People v. Miles, 188 Ill.App.3d 471, 480, 544 N.E.2d 986, 992-93 (1st Dist. 1989) (citations omitted and emphasis added)--issued post-Enoch and expressly referring to that decision--explains Illinois waiver law as to the admission of confessions:

> The failure to challenge the admission of a confession at trial either by a motion to suppress or by appropriate objection at trial and then by a post-trial motion generally waives appellate review of the matter. Additionally, a defendant must normally challenge the voluntariness of a confession by a motion to suppress which, under Illinois law, must be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion."

Miles thus teaches that a defendant who raises the voluntariness of his confession in both a pretrial motion to suppress and a post-trial motion for a new trial, though not by an objection at trial, has preserved the issue for appellate review. That principle, which recognizes the procedural equivalence of a pretrial motion to suppress and an objection on the same ground during trial, is well settled in Illinois law (see, e.g., People v. Taylor, 33 Ill. 2d 417, 421, 211 N.E. 2d 673, 675 (1965); People v. Calderon, 101 Ill. App. 3d 469, 477, 428 N.E. 2d 571, 576 (1st Dist. 1981); People v. Hall, 40 Ill. App. 3d 56, 61, 351 N.E.2d 639, 643 (1st Dist. 1976)).

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[8] In Enoch, 122 Ill. 2d at 185-87, 522 N.E. 2d at 1129-30 the defendant objected at trial to the admission of certain evidence, but he did not also comply with •the Illinois statutory requirement that he file a post-trial motion raising that issue.

By finding that Hardaway waived the right to appeal because he did not object during the trial, the Illinois Appellate Court flew in the face of those firmly grounded precedents--which, it should be repeated, were confirmed post-Enoch in the Miles case. Nor did the court acknowledge that well-established line of authority and say that it had decided that the law should be changed--and even had it done so, it could not of course be said to be applying a "solidly established" procedural bar (quite the contrary). This Court therefore holds that Hardaway did not procedurally default the issue of the voluntariness of his 10:30a.m. and 4:30 p.m. statements. So there is no question that Hardaway has preserved his claim for federal habeas review by having raised the issue of his statements' claimed involuntariness at every appropriate stage of the state court proceedings. This opinion proceeds to the merits of Hardaway's claims. Involuntariness of the Challenged Statements

To that end this Court looks to the earlier-quoted Section 2254(d) (1) dichotomy as explicated in Williams, 529 U.S. at 402-13. Here the Illinois courts satisfied one branch of that analysis by having applied the correct rule regarding voluntariness as derived from Supreme Court precedent. It is well-established that the voluntariness of all confessions, including those of juveniles, must be evaluated based on the

totality of the circumstances surrounding the confess(Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Gallegos v.Colorado, 370 U.S. 49, 55 (1962)). And the Court has long recognized the need to exercise _special caution" when assessing the voluntariness of juvenile confessions (In re Gault, 387 U.S.I, 45 (1967)). Among the factors the Court has looked to for that purpose are the youth of the accused, his or her education and prior experiences with the criminal justice system, the length of detention, whether the questioning is repeated or prolonged and the presence or absence of a parent, lawyer or other friendly adult during an interrogation (Schneckloth, 412U.S. at 226; Gallegos, 370 U.S. at 54-55; Haley v. Ohio, 332 U.S.596, 599-600 (1948)).

In evaluating Hardaway's statements the Illinois courts did indeed speak of a totality-of-circumstances approach, stating that they weighed Hardaway's age and the length of the repeated interrogations by relays of detectives against his previous experiences with the criminal justice system, 9 his professed understanding of his Miranda rights and the presence of a youth officer during the later interrogations. In those terms the trial court determined that Hardaway's statements were voluntary, and the Illinois Appellate Court affirmed.

9 Those prior contacts included 12 court referrals for delinquency, 3 other court referrals adjusted in Complaint screening and 7 station delinquencies.

Because the Illinois courts thus applied the right rule in evaluating the voluntariness of his statements, Hardaway's entitlement to habeas relief hinges on his ability to demonstrate that the state courts applied that rule unreasonably. On that score Hardaway urges that his youth, the length of the repeated interrogations and the absence of a parent or effective adult advisor render his statements involuntary under United States Supreme Court precedents. [10] That contention requires an analysis of the earlier Supreme Court cases dealing with juvenile confessions.

More than a half century ago Haley, 332 U.S. at 599-600 found involuntary the confession of a 15-year-old obtained after five hours of late-night interrogation outside of the presence of his mother or an attorney: [W]hen, as here, a mere child--an easy victim of the law--is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim for the inquisition. Mature men possibly might stand

[10] Hardaway also alleges that one of the detectives abused him during questioning and that the detectives frustrated his parents" attempts to confer with him before the interrogations, but the trial court resolved those factual issues against him. Hardaway has not rebutted the presumption of correctness of the trial court's determination by clear and convincing evidence, so this Court will not overturn those findings (Section 2254(e) (1)).

the ordeal from midnight to 5 a.m. But we can not believe a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. Nor did Haley, *id.* at 601 find convincing the prosecution's argument that the youth's confession was voluntary because he had been informed of his constitutional rights: But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain. Gallegos, 370 U.S. at 54 again addressed the need for friendly adult counsel during juvenile confessions, holding involuntary the confession of a 14-year-old who was prevented from seeing his mother, an attorney or any other friendly adult during five days of detention: The prosecution says that the boy was advised of his

right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. Galleqos, id. (emphasis added) then continued: He would have no way of knowing what the consequences of his confession were without advice as to his rights--from someone concerned with securing him those rights--and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights. Next Gault, 387 U.S. at 55 held involuntary the confession of a 15-year-old who had not been advised of his constitutional rights and was interrogated in the absence of a parent, attorney, or other friendly adult: We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique--but not in principle--depending on the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel

was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair. Neither time nor intervening caselaw has attenuated, let alone vitiated, the combined force of Haley, Gallegos and Gault.[11] This Court finds unreasonable the state court's finding that Hardaway's 10:30 a.m. and 4:30 p.m. statements were voluntary under the totality of the circumstances. Neither Hardaway's parents nor an attorney nor a youth officer was present during the first 10 hours of this 14-year-old's interrogations to provide "counsel and support" and protect him from becoming "the victim first of fear, then of panic" (Haley, 332 U.S. at 600). Even younger than the defendant in Haley and interrogated twice as long, Hardaway confessed his part in the murder to a police detective while entirely alone--with no friendly adult present. While to be sure Hardaway had been read his Miranda rights and given a juvenile warning before making those statements, the

[11] Hardaway's circumstances are clearly distinguishable from those in Fare v. Michael C., 442 U.S. 707, 726-27 (1979), in which the Court found voluntary the statements made by a 16-1/2 year old with several prior convictions after a brief police interrogation, despite the absence of friendly counsel. Importantly, paralleling the cases discussed in the text, Hardaway was two years younger than the defendant in Fare, had no prior convictions and was subjected to over 10 hours of repeated interrogations.

detective made no effort at all to assess whether Eardaway truly understood the nature of his rights. Hardaway's youth, the repeated and prolonged nature of the questioning and the lack of any friendly counsel render his 10:30 a.m. and 4:30 p.m. statements involuntary under the totality of the circumstances. So those statements should have been suppressed, and the Illinois courts' failure to do so represents an unreasonable application of Supreme Court precedent within the meaning of Section 2254(d) (I) as expounded upon in Williams v. Taylor. That leaves for consideration only the question whether the presence of Youth officer Geraci during the later 7 p.m. and 10:45 p.m. statements sufficed to render those statements voluntary under the totality-of-the-circumstances test despite the involuntariness of Hardaway's earlier statements. Once again this Court finds the Illinois courts' affirmative conclusion is fatally flawed. Whether a self-inculpatory statement that follows an involuntary statement of the same nature can nonetheless be considered voluntary depends in large part upon whether there is a "break in the stream of events...sufficient to insulate the statement from the effect of all that went before" (Clewis v.Texas, 386 U.S. 707, 710 (1967)). [12] In determining the

[12] Clewis, id. held involuntary a confession that occurred five days following a prior concededly involuntary confession, during which time the defendant was held in the county jail but

sufficiency of an intervening break, courts look to such factors as the time that elapsed between confessions, whether the interrogations took place in the same location and whether the identity of the interrogators changed between the interrogations (Oregon v. Elstad, 470 U.S. 298, 310 (1985)). "[13] See also Westover v. United States, a lesser-known case decided together with Miranda v. Arizona, 384 U.S. 436, 494-96 (1966). [14]

This Court finds under the totality of the circumstances that the taint from Hardaway's 4:30 p.m. involuntary confession had not dissipated by the time of his 7 p.m. and 10:45 p.m. confessions. Although the interrogators renewed the Miranda and juvenile warnings, the place of the interrogation remained the same and no really appreciable period of time had elapsed since the end of the 4:30 p.m. interrogation, during which Hardaway had given a full account of his involvement in the crime--certainly not enough to "insulate the statement from the effect of all that went before." In that respect it is noteworthy that Detective _____ was not subjected to any intervening interrogation.

[13] Elstad, id. at 1314 held voluntary a confession obtained after a proper waiver of the defendant's rights despite the fact that the police had obtained an earlier voluntary, but unwarned, admission from the defendant.

[14] Westover, id. held involuntary a confession obtained by FBI agents who, though they warned the defendant of his rights, interrogated him in the same location as, and immediately following, a 14-hour interrogation by the local police, who had not given defendant any like warning of rights.

McCann, who had elicited the 4:30 p.m. confession from Hardaway, continued to be present during the later confessions.

Importantly, Geraci (though present as an almost totally passive observer) wholly failed to fulfill the role of a friendly adult during the 7 and 10:45 p.m. interrogations, providing the 14-year-old Hardaway with none of the counsel needed to ensure that he had a full appreciation of the potential consequences of making a statement. Although Hardaway did recount to Harney his understanding of the rights warning and did not ask for either his parents or an attorney, that did not relieve Geraci of his responsibilities. Geraci made no affirmative effort to provide counsel to the 14-year-old, instead merely saying with the interrogators present that he was there to do anything he could for Hardaway. Geraci never even tried to speak to Hardaway in private, nor did he make any attempt to assess whether Hardaway understood his constitutional rights or wanted to talk to his parents or an attorney. To be properly effective, a friendly adult does not wait passively for a juvenile to voice a need for help--instead such an adult acts affirmatively to protect the juvenile's interests, because the very need for a friendly adult is grounded in the recognition that a juvenile lacks the experience or maturity to do so on his or her own (see Gallegos, 370 U.S. at 54).

Hence this Court holds that the mere presence of Geraci,

without undertaking a single affirmative act to protect Hardaway's rights and interests, does not render the 7 p.m. and 10:45 p.m. statements voluntary--coming as they did hard on the heels of the earlier involuntary confessions obtained from Hardaway. Any finding that Geraci's passive presence sufficed to insulate Hardaway's later statements from the earlier involuntary statements would unreasonably flout the standard articulated by the Supreme Court's Clewi decision. Because the state court determination regarding the voluntariness of Hardaway's later inculpatory statements was thus also unreasonable, Hardaway has demonstrated his entitlement to a writ.

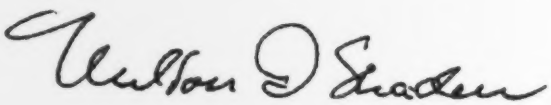
Conclusion

In summary, 14-year-old Derrick Hardaway was subjected to repeated interrogations over the course of 16 hours in the absence of his parents, an attorney or other effective friendly counsel. Although Hardaway had some prior experience with the criminal justice system and although he professed to understand his constitutional rights, the totality of the circumstances--particularly his youth, the length of the interrogation period and the absence of an effective friendly adult throughout that period (especially because the original tainted statements were elicited in the total absence of even a nominally friendly adult, and were then followed shortly by the token presence of an unhelpful though neutral adult observer)--rendered all of

Hardaway's statements involuntary under well-established United States Supreme Court precedent. Hence the Illinois courts applied the vital and dispositive Supreme Court precedents unreasonably in finding Hardaway's statements to have been voluntary.

As stated earlier, Hardaway's constitutionally violative self-incriminatory statements were critical to his conviction. Their admission rendered his trial fundamentally unfair--and there is no way to evaluate what the verdict would have been if the well had not been poisoned by the jury's exposure to and consideration of those statements.

In accordance with Section 2254 and the Section 2254 Rules, this Court therefore grants Hardaway's Petition. It determines that justice requires (see Section 2254 Rule 8(a)) that unless the State of Illinois retries Hardaway within 120 days from the date of this opinion on the charge on which he was convicted, it shall release him from custody.



Milton I. Shadur
Senior United States District Judge

Date: September 13, 2001